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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

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QUESTIONS PRESENTED

Petitioner Keene Corporation, a defendant in nearly ninety-thousand asbestos-related products liability actions nationwide, was assessed twenty-one separate punitive damages verdicts in these consolidated cases for the identical course of conduct. These punitive damages verdicts, and the other $13 million in punitive awards against Keene, cannot be justified on any constitutional or doctrinal basis. Keene petitions this Court to stop, once and for all, the unwarranted, unjustifiable and unconstitutional imposition of repetitive punitive damages in asbestos litigation. The specific questions presented are:

1. Whether the imposition of repetitive punitive damages awards for

the same course of conduct violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the unexplained and arbitrary refusal of the West Virginia Supreme Court of Appeals to follow this Court's directive in Pacific Mut. Life Ins. Co. v. Haslip, and its own directive in Garnes v. Fleming Landfill, Inc. to review the punitive damages verdicts in these cases violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, especially where another jury, hearing the exact same evidence at the same time and place and under the same legal "standard" found no punitive damages.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceedings below include petitioner, Keene Corporation (defendant below), and respondents Leonard Adams (and his wife, Lucille Adams), Garlen Burton (and his wife, Ann Burton), George Campbell (and his wife, Barbara Campbell), Leslie Carr (and his wife, Ruth Carr), John Chapman, Arville Dalton (and his wife, Ethell Dalton), James Darrah (and his wife, Patricia Darrah), Paul Dunn, Terry England, William Gabbert, George Hoschar (and his wife, Alice Hoschar), Everett Johnson (and his wife, Mary Johnson), James Kirk (and his wife, Lois Kirk), William Little (and his wife, Hilda Little), Foster Lipscomb, Nelson Lott (and his wife, Wilda Lott), G.V. Mehalic (and his wife, Evelyn Mehalic), Jeryl Root (and his

wife, Dorothy Root), Stanley Rowe (and his wife, Linda Rowe), Joseph Sberna (and his wife, Sandra Sberna) and Joseph Shilot (and his wife, Myrtle Shilot) (plaintiffs below).

Owens-Corning Fiberglas Corp., a defendant in the proceedings below, is filing a separate petition for writ of certiorari with this Court.

Armstrong World Industries, Inc., Fibreboard Corp., Garlock, Inc., GAF Corp., National Gypsum Co., U.S. Gypsum Co. and Flexitallic, Inc. were defendants at trial below but settled their differences with plaintiffs prior to return of a verdict and entry of judgment, and were not parties to the petition for an appeal to the West Virginia Supreme Court of Appeals.

Nitro Industrial Coverings initially was a defendant at trial but was

dismissed on directed verdict at the close of plaintiffs' case. Since that litigant was dismissed prior to return of the jury's verdict and entry of judgment, it was not a party to the petition for an appeal to the West Virginia Supreme Court of Appeals.

Pursuant to Rule 29.1, Keene Corporation states that it is a publicly-held corporation which has no parent company and no affiliates or other than wholly owned subsidiaries.

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LEONARD ADAMS, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Petitioner, Keene Corporation [hereinafter "Keene"], respectfully prays that a writ of certiorari issue to review the March 11, 1992 judgments of the Circuit Court of Monongalia County, West Virginia which the Supreme Court of Appeals for the State of West Virginia refused to review by an order entered in this proceeding on May 13, 1992.

OPINIONS BELOW

The order of the Supreme Court of Appeals for the State of West Virginia refusing Keene Corporation's petition for appeal is unpublished and appears in slip opinion form in the appendix hereto at pages A-101 to A-102.[1] No opinion accompanied the Order.

The Orders of the Circuit Court of Monongalia County, West Virginia, denying

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[1] Hereinafter, citations to the appendix will be stated as PA-___.

defendants' post trial motions and entering judgment are unpublished and appear in slip opinion form in the appendix hereto at PA-2 to PA-100.

JURISDICTION

The Order of the Supreme Court of Appeals for the State of West Virginia denying Keene Corporation's petition for appeal was entered on May 13, 1992. The Orders of the Circuit Court of Monongalia County, West Virginia, denying defendants' post trial motions and entering judgment were entered on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amendment XIV, § 1, is reprinted in the Appendix at A-1.

STATEMENT OF THE CASE

Twenty-one plaintiffs[2] and their respective spouses,[3] filed civil actions in the Circuit Court of Monongalia County, West Virginia, alleging personal injury and loss of consortium due to plaintiffs' occupational exposure to asbestos and asbestos-containing products during their employment at various industrial and commercial jobsites throughout West Virginia and surrounding states. Plaintiffs alleged that they were exposed to asbestos-containing

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[2] Leonard Adams, Garlen Burton, George Campbell, Leslie Carr, John Chapman, Arville Dalton, James Darrah, Paul Dunn, Terry England, William Gabbert, George Hoschar, Everett Johnson, James Kirk, William Little, Foster Lipscomb, Nelson Lott, G.V. Mehalic, Jeryl Root, Stanley Rowe, Joseph Sberna and Joseph Shilot.

[3] Lucille Adams, Ann Burton, Barbara Campbell, Ruth Carr, Ethell Dalton, Patricia Darrah, Alice Hoschar, Mary Johnson, Lois Kirk, Hilda Little, Wilda Lott, Evelyn Mehalic, Dorothy Root, Linda Rowe, Sandra Sberna and Myrtle Shilot.

products manufactured, supplied or installed by nineteen different defendants, including petitioner Keene. Plaintiffs further alleged injuries ranging from non-disabling pleural thickening to various cancers. Each and every plaintiff's Complaint included claims for both compensatory and punitive damages. The wording of each plaintiff's punitive damages claim was identical.

Due to settlements, dismissals and bankruptcies of certain defendants, ten defendants[4] remained at the time of trial. Asserting "judicial economy" as a justification, the court consolidated for trial the claims of the plaintiffs at bar

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[4] Armstrong World Industries, Inc., Fibreboard Corp., Garlock, Inc., GAF Corp., National Gypsum Co., U.S. Gyspsum Co. and Flexitallic, Inc. settled during the course of the trial. Nitro Industrial Coverings was dismissed on directed verdict at the close of plaintiffs' case. Owens-Corning Fiberglas Corp. and Keene Corporation remained at the time of the jury's verdict.

[hereinafter the "plaintiffs" or the "Adams group"] with those of another group of fifteen additional claimants and their respective spouses [hereinafter the "Barnes group"][5]. The cases were divided into two courtrooms with the Hon. Larry V. Starcher presiding over the trial of the twenty-one claims from Adams' group and the Hon. Robert B. Stone presiding over the trial of the fifteen claims in the Barnes group. The trials commenced with opening statements on October 17, 1990, before two separate juries and proceeded simultaneously.

At certain points during the course of the trial, *both* juries (and both judges, and both sets of attorneys), convened in a single courtroom to hear

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[5] Keene is not petitioning for a writ of certiorari with respect to the verdicts in the Barnes group.

the testimony of "common" witnesses, that is, witnesses who were not presenting testimony peculiar to any single plaintiff in either courtroom. This included the opening statements and all witnesses testifying on the issue of punitive damages. Thus, the juries in the two separate trials heard literally the identical evidence with respect to the punitive damages claims made against Keene and the other defendants.

Prior to submission of the case to the jury, Keene moved to strike plaintiffs' punitive damages claims. At the close of plaintiffs' case, the following exchange took place:

> MR. HENDRICKSON: Your Honor, at this time, too, I would move for a directed verdict on behalf of my client, Keene Corporation, on the issue of punitive damages. I am not going to go into all the constitutional basis [sic] because you have heard those

> arguments before, and I assume that your rulings on the constitutional basis will remain the same as they were in the past.
>
> THE COURT: Law is still the same. We think some day it may change, but as of today it is still the same.
>
> MR. HENDRICKSON: I am not going to waste your time, and they would be incorporated into the record.

Trial Transcript, Adams v. Armstrong World Industries, No. 86-C-764 (Circuit Court of Monongalia County, West Virginia) [hereinafter "Trial tr."] 11/2/90, Vol. XII, p.2815, L.10 to L.24.[6] The trial court, having previously ruled on similar motions in other asbestos trials, summarily denied

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[6] The constitutional arguments to which counsel for Keene referred include arguments that multiple punitive damages awards for the same course of conduct, and the lack of adequate standards under West Virginia law, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. These arguments were more fully set forth in Keene's motion papers to the trial court, which appear in the appendix hereto at PA-103 to PA-185.

Keene's motions without further argument.

Judge Starcher charged the jury in this case on the issue of punitive damages as follows:

> The court instructs the jury that under West Virginia law a defendant may be held liable for punitive damages in the actions of tort [sic] such as this if the evidence reveals that a defendant in an action where punitive damages are sought was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to civil obligations affecting the rights of others. Therefore, you are instructed that if you believe that either defendant corporation was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to its civil obligations, then you may award punitive damages against said defendant.
>
> The court instructs the jury that punitive damages are awarded to punish a defendant and to deter others from pursuing a like course of conduct. The amount of punitive damages awarded, when

> considered together with compensatory damages, should be in such amount as the jury believes is sufficient to deter others from engaging in a like course of conduct.

Judge's Charge to Jury, Nov. 8, 1990, p.13, L.13 to p.14, L.3. Judge Stone gave literally the identical charge to the Barnes jury.

On November 13, 1990, the Adams jury returned a verdict in favor of plaintiffs for a total of $1,217,040 in compensatory damages -- 15% of which was assessed against Keene in each case. In addition, the jury was asked the following question as to each plaintiff:

> Do you find from a preponderance of the evidence that [plaintiff] should recover *punitive* damages from any of the following defendants because of having acted in a malicious, oppressive, wanton, willful or reckless manner? (emphasis in the original).

The jury answered "yes" as to Keene in each case, and made identical $5,000 punitive damages awards to each of the twenty-one Adams plaintiffs.[7]

On November 15, 1990, the Barnes jury returned a verdict. In the Barnes group, Keene's liability for various plaintiffs' compensatory damages ranged from 0% to 7%, with the majority of findings around 2%. Furthermore, after considering the identical evidence on which the Adams jury imposed punitive damages against Keene, the Barnes jury found that Keene was *not* liable for punitive damages.

Keene thereafter filed post trial motions, arguing, *inter alia*, that the trial court erred in submitting the issue

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[7] The conduct "punished" was precisely the conduct for which $13 million in punitive damages have been awarded in other cases. *Keene Corporation Form 10-Q* for quarterly period ending June 30, 1992.

of punitive damages to the jury because the awards of punitive damages in these cases violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as analogous provisions of the West Virginia Constitution. In addition, Keene argued that punitive damages are inappropriate as a matter of public policy in asbestos-related multi-plaintiff products liability litigation. On March 11, 1991, the trial court summarily denied all defendants' post-trial motions and entered Judgment Orders in all cases. The trial court supplied no basis for its denial of the motions, and in particular, gave no indication that it considered any set of criteria for evaluating the propriety of the jury's punitive damages awards.

On March 4, 1991, this Court issued its opinion in Pacific Mutual Life Insurance Company v. Haslip, 111 S. Ct. 1032 (1991), which examined the issue of whether an award of punitive damages could violate the Fourteenth Amendment's Due Process Clause. In holding that punitive damages proceedings do implicate due process protections, this Court declared that the Due Process Clause imposes both substantive and procedural limitations on awards of punitive damages. 111 S. Ct. at 1044-46. Substantively, an award may not exceed the amount required to meet the societal goals of deterrence and retribution, while procedurally, adequate mechanisms must be in place to ensure that an award of punitive damages is not constitutionally excessive. Id. at 1044-45. This Court then upheld the Alabama

scheme for awarding punitive damages, which included detailed criteria to be examined during post-trial review of all punitive damages verdicts. Id. at 1044-46.

Shortly after rendering its decision in Haslip, on June 28, 1991, this Court granted a petition for writ of certiorari to the Supreme Court of Appeals of West Virginia in the case of Fleming Landfill, Inc. v. Garnes, 111 S. Ct 2882 (1991). This Court vacated the judgment in that case, which included an award of punitive damages, and remanded it to the Supreme Court of Appeals of West Virginia for further consideration in light of the Haslip decision. Id.

On September 11, 1991, Keene filed a Petition for Appeal with the Supreme Court of Appeals for the State of West Virginia. Once again, Keene argued that

the submission of plaintiffs' punitive damages claims violated the United States and West Virginia Constitutions. In addition to the arguments raised before the trial court, Keene emphasized that this Court's holding in Haslip, especially in light of its decision in Fleming, unequivocally demonstrated the unconstitutionality of the West Virginia scheme under which the punitive damages were awarded in these cases.

Thereafter, on December 5, 1991, the Supreme Court of Appeals for West Virginia issued its opinion on remand in Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991). The Garnes court reversed the trial court judgment awarding punitive damages, correctly finding that the then-existing West Virginia punitive damages scheme was unconstitutional under this Court's

opinion in Haslip. Id. at 910. The court directed that, upon remand, the trial court was to "carefully explain [to the jury] the factors to be considered in awarding punitive damages." Id. at 908-9. The Garnes court then listed the factors to be considered, which recreated nearly verbatim the list of factors considered under the Alabama scheme as they appeared in this Court's opinion in Haslip. Id. at 909. The Garnes court further held that the trial court and appellate court, upon review, must consider certain additional factors, again taken nearly verbatim from Haslip. Id. Finally, the court held that a trial court is required to "thoroughly set out the reasons for changing (or not changing) the award." Id. at 910.

But in the face of its own ruling in Garnes striking as unconstitutional the

same West Virginia punitive damages scheme applied in the Adams cases at bar, the Supreme Court of Appeals inexplicably refused defendants' petitions for appeal on May 13, 1992. The court gave no reason for its decision. Indeed, the court did not explain why it did not vacate the judgment and remand the case to the trial court in accordance with its own decision in Garnes. Nor did the court explain why the punitive damages verdicts in these cases did not violate defendants' due process rights, given the fact that neither the jury nor the reviewing court considered any of the factors which the Haslip and Garnes courts held were constitutionally mandated.[8]

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[8] Haslip mandates that a court reviewing the punitive awards at bar should have evaluated the following facts with respect to Keene.

Keene is a custom manufacturer of heat-absorbing composites, sheet molding compounds and -

structural composite components for a variety of aerospace, defense and commercial applications. *Keene Corporation Second Quarter Report for the Period Ending June 30, 1992 and a Report to Stockholders Presented at the Annual Meeting April 21, 1992* (July 9, 1992) (hereinafter "*Second Quarter Report*").

Keene has never manufactured or sold any asbestos-containing products. Keene, however, is a defendant in asbestos cases because, in its second year of existence in 1968, Keene acquired substantially all of the stock of Baldwin-Ehret Hill, Inc. ("BEH"), for $8 million. Before 1972, a small portion of BEH's product line was insulation materials, of which a few included small amounts of asbestos to meet customers' specifications. (The fiber purchased by BEH accounted for less than 1% of all asbestos fiber used annually in the United States). In 1972, only four years after Keene purchased the company, BEH stopped manufacturing products containing asbestos. The BEH division was never profitable during the years it was owned by Keene. By 1975, the entire insulation division was shut down. *Keene Corporation Annual Report, 1991* (January 20, 1992) (hereinafter "*1991 Annual Report*")

By the time Keene purchased BEH, health hazard warnings were being placed on BEH products. During the entire period Keene's subsidiaries made products containing asbestos (1968-1972) the product carried a warning label. *1991 Annual Report*

Despite this modest history and Keene's lack of culpability for the acts of its predecessors, Keene already has spent nearly $400 million in asbestos-related personal injury litigation. Of this amount, the bulk of the money - over one quarter billion dollars - has been indemnity payments to claimants and their lawyers. Keene has been sued over 156,000 times; although it has settled or tried nearly 78,000 cases, it still faces approximately 87,000 claims. New filings continue unchecked; 50% more cases have been filed to date in 1992 against Keene than in the comparable period in 1991. New filings outpace settlements and other

Keene thereafter filed this Petition for a Writ of Certiorari.

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dispositions by nearly two-to-one. In a widely publicized asbestos compensation program in July, 1990, Keene offered $190 million-- approximately 80% of its net worth - in addition to what it had spent already, to resolve all meritorious personal injury claims. Over 25,000 claims have been settled under this program. *Second Quarter Report*.

In the past twenty-four months, approximately 500 jury verdicts had been returned against Keene in asbestos-related bodily injury cases, of which 251 remained outstanding. With trials continuing nearly every day, the numbers change constantly, but as of August 3, 1992, the outstanding verdicts totaled approximately $70 million in compensatory damages, of which approximately $13 million were punitive damages awards. These punitive damages awards all have been assessed for the identical course of conduct - BEH's production of asbestos insulation. By June 30, 1992, Keene's net worth had been reduced to approximately $134 million with an additional $58 million in insurance coverage believed to be available for the asbestos liabilities. *Keene Corporation Form 10-Q*, for quarterly period ending June 30, 1992.

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF REPETITIVE PUNITIVE DAMAGES AWARDS FOR THE SAME COURSE OF CONDUCT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. Multiple Punitive Damages Awards for the Same Course of Conduct in This, or Any Other Asbestos Case, do not Further the Societal Goals of Punishment and Deterrence

The Due Process Clause of the Fourteenth Amendment to the United States Constitution embodies a requirement of "fundamental fairness" in both criminal and civil proceedings - "a requirement whose meaning can be as opaque as its importance is lofty." See, Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25 (1981). Under this Court's recent decision in Pacific Mutual Life Ins. Co.

v. Haslip, 111 S. Ct. 1032 (1991), the punitive damages imposed in this case, even though small in amount[9], violate the "fundamental fairness" requirement of the Due Process Clause.

Addressing a due process challenge to the common law system of awarding punitive damages, this Court in Haslip repeated its concern about punitive damages that 'run wild,'" and firmly rejected the idea that the imposition of

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[9] Keene acknowledges that twenty-one punitive damages verdicts of $5,000 each, which cumulatively approximate the annual salary of two Supreme Court clerks, are not likely to incite a great deal of indignation. Indeed, Keene does not suggest that the *size* of the punitive awards in *these* cases carries any constitutional implications, although the fact that there are additional punitive verdicts (totalling $13 million) against Keene is not irrelevant. Size notwithstanding, these verdicts represent a violation of Keene's constitutional rights. In Giacco v. Pennsylvania, 382 U.S. 399 (1966), this Court found that an overly vague state statute violated a defendant's due process rights, even though the civil penalty imposed by the jury in that case was only $230.95 (the civil penalty assessed in these cases was 456 times greater).

punitive damages "is never unconstitutional." Id. at 1043.

Haslip established that the Due Process Clause imposes both substantive and procedural limitations on awards of punitive damages. 111 S.Ct. at 1044-46. Substantively, an award may not exceed the amount required to meet the societal goals of deterrence and retribution. Id. at 1044-45. Procedurally, a system of awarding punitive damages must provide adequate mechanisms for ensuring that an award of punitive damages is not constitutionally excessive - that is, that the award furthers the goals of deterrence and retribution. Id.

The standards set forth by this Court in Pacific Mutual Life Ins. Co. v. Haslip provided the much-needed doctrinal

foundation[10] for addressing the constitutional concerns of repetitive punitive damages. While many courts in the past have railed against the injustice of multiple punitive damages

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[10] Prior to Haslip, many courts gave lip service to the concept that multiple awards of punitive damages violate the Due Process Clause of the Fourteenth Amendment. In Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053 (D.N.J. 1989) vacated on other grounds 718 F.Supp. 1233 (D.N.J. 1989), the court concluded in an asbestos case that "due process places a limit on the number of times and extent to which a defendant may be subject to punishment for a single course of conduct." Id., 705 F.Supp. at 1064; See also, In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 900 (N.D. Cal. 1981) vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). Indeed, as early as 1967, Judge Friendly expressed serious concerns about the award of repetitive punitive damages in mass tort situations: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). See also, In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.")

However, lacking the necessary doctrinal foundation, each of these courts declined to declare outright that multiple awards of punitive damages violate the Due Process Clause.

awards for the same course of conduct, Haslip provides, for the first time, a framework within which to evaluate the constitutional implications of multiple punitive damages awards. This petition presents, for the first time since Haslip, an opportunity for this Court to apply those standards to the intolerable morass represented by asbestos litigation.

The mandate of Haslip, established in a single case involving a single punitive damages award, is considerably more compelling in this case, where the jury assessed twenty-one separate punitive damages verdicts for the identical course of conduct.[11] Indeed,

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[11] There can be *no* question that the punitive damages awarded in these cases was for the same course of conduct. Although there were twenty-one separate plaintiffs, the jury heard only one set of evidence in support of all twenty-one plaintiffs' punitive damages claims. The evidence the jury considered was wholly

multiple awards of punitive damages for the same course of conduct is routine in asbestos litigation: $13 million against Keene alone and more than $300 million against defendants in the aggregate between 1987 and 1990.[12] The punitive verdicts in these cases, and the total failure of the reviewing courts to review them under the constitutional standards mandated in Haslip, is merely a microcosm of the asbestos litigation nationwide, where courts routinely ignore legal precedent if they believe it will help move cases. Implicit in the Haslip standards is the necessity of considering

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generic and not peculiar to the claims or injuries of any single plaintiff. This is best evidenced by the fact that the jury assessed $5,000 in punitive damages for each and every plaintiff's claim, irrespective of the injury sustained by that plaintiff or the amount of the compensatory verdict.

[12] Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1868 n.198 (1992) [hereinafter "Brickman"].

the state of asbestos litigation nationwide.

Neither the goal of punishment nor deterrence is furthered by the repeated imposition of punitive damages against *any* defendant in *any* asbestos case. "[T]here can be no even vague assurance that the social function of punitive damages has not been exceeded many times over...." Hensler, Asbestos in the Courts, The Challenge of Mass Toxic Torts (Rand Corporation Institute for Civil Justice, 1985) [hereinafter "Hensler"], at xxix - xxx. If the purpose of punitive damages is to punish, previous awards of punitive damages, as well as more than $9 billion[13] spent in defense

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[13] See, Oliver, Who Will the Asbestos Monster Devour Next?, Forbes, February 18, 1991, at 75, 79 [hereinafter "Forbes"]. The transaction costs associated with asbestos cases are higher than for any other type of tort litigation for which figures are available. Hensler, at xxvii. The Rand Institute estimates

and compensation,[14] surely are punishment enough.[15]

Similarly, the deterrence rationale does not apply to asbestos cases, since many defendants, like Keene, never manufactured any asbestos-containing products and most others have not manufactured such products for decades. As to other producers of other products,

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that 63% of all costs expended in the asbestos litigation are consumed as "transaction costs," the majority of which are attorneys' fees. Id. at 3. This means that, of the approximately $9 billion expended so far, approximately $3.3 billion has gone to compensate victims, while more than $5.7 billion has gone to the lawyers.

[14] Forbes, supra at 79. "Pending cases could cost another $20 billion.... [T]he final tab could hit $50 billion or even $100 billion." Id.

[15] Asbestos defendants also have been repeatedly "punished" by being forced to pay enhanced levels of compensation due to doctrine of joint and several liability coupled with the bankruptcy of the majority of the asbestos producing market. "Driven by the need to fill the financial void created by the bankruptcy [of Johns-Manville] or else have to deny adequate compensation to meritorious claimants, courts and claimants have determinedly imposed Manville's former liability share upon others. Brickman, supra, at 1825.

it is nonsense to argue that eliminating multiple punitive damages awards in asbestos cases would reduce their incentive to market safe products, given what they can observe about the current status of asbestos litigation and the actual and threatened bankruptcies of the majority of the defendants. Further imposition of punitive damages will not provide any additional deterrence for manufacturers of asbestos-containing products, or any other products.

The resources available to compensate plaintiffs and their lawyers are limited. Given the huge sums already collected, punitive damages undeniably are windfalls for the few at the expense of thousands of future claimants. If Keene is forced to defend and pay repeated punitive damages awards, Keene's financial resources - indeed the

resources of all of the defendants - will be tapped beyond their capacity. The Roginsky court cautioned that "a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." 378 F.2d at 841. The Juzwin court recognized, "[t]he right to assess punitive damages in mass tort litigation permits a jury to punish but not execute a company." Juzwin v. Amtorg Trading Corp., 705 F.Supp. at 1063.[16]

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[16] Yet, at least sixteen companies already have been forced into bankruptcy or been liquidated as a result of asbestos litigation - more bankruptcies and more lost jobs are not needed to drive the point home. Brickman, supra, note 12, at 1819.

It cannot rationally be argued that any legitimate societal goals - and certainly not those of punishment and retribution - are advanced by additional punitive damages awards in these cases. When punitive damages awards fail to serve those goals, as they fail to do in asbestos cases, their imposition becomes a monstrous violation of defendants' constitutional rights which can no longer be tolerated.

2. Additional Awards of Punitive Damages Serve Only to Reward Lawyers While Undermining Legitimate Societal Goals.

Although several courts have expressed concern that successive punitive damage awards may, as a practical matter, prevent compensation of future claimants, none has done anything about it. Some have even stated or

implied that, if they were to strike punitive claims, plaintiffs in their courtrooms would be disadvantaged as the assets of companies are siphoned off in other jurisdictions where punitive damages were permitted.[17] For example,

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[17] One of the most honest, yet disturbing, statements of this reality is the testimony of a justice in the court below. Richard Neely, a justice of the West Virginia Supreme Court of Appeals, the court which refused to review this case, confessed: "No matter how responsible I or the other members of our courts want to be as state court judges, we are powerless to improve the overall American products liability system or reduce the exposure of West Virginia manufacturers to the caprice of malice of out-of-state courts and juries. By trying unilaterally to make such improvements, we will succeed only in impoverishing our own state's residents without doing anyone, anywhere, any measurable good. Unless we want to be 'suckers,' as state court judges we must immediately incorporate the latest pro-plaintiff wealth redistribution theories applied in other states into West Virginia's decisional law. If we conceive and apply new wealth distribution theories before anyone else, we can even garner for ourselves more than our fair share of the national product liability insurance pool. Every jurisdiction then, must ultimately follow the most irresponsible state." *Brickman*, supra note 12, at p. 1833 (emphasis in original) (quoting Justice Neely's September 12, 1991 sworn testimony before the Senate Commerce Committee).

Justice Neely was slightly more frank when he bluntly admitted: "[A]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so." "With Punitive Damages, Let

the court in Juzwin v. Amtorg Trading Corp., 105 F. Supp. 1053, struck punitive damages, recognizing the serious problem of the depletion of available assets:

> There is a decided risk that the earlier claimants will deplete the available assets to pay later claimants. Such a risk may exist even as to compensatory damages, but it would seem inappropriate to impose repeated penalties on a company if the result is to deny compensatory damages to subsequent claimants. If there is a limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who already have been compensated.

105 F. Supp. at 1055 (emphasis in original). Yet, Judge Sarokin later vacated his order, citing concern about "the court's inability to effectuate its ruling prospectively absent uniformity either through legislation or a Supreme

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the Foreigner Beware," The Wall Street Journal, March 18, 1992, at p. A-15.

Court decision." Juzwin v. Amtorg Trading Corp., 718 F. Supp. at 1235. The Juzwin court further lamented: "[T]he court is powerless to limit other courts from considering identical punitive damages claims against the same defendants...." Id. at 1236.

Similarly, Judge Weinstein observed in In re Johns-Manville Corp., 129 B.R. 710, 751 (E.D.N.Y. 1991): "[T]here is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims . . . would lead to a declaration of insolvency." Yet, Judge Weinstein did not declare punitive damages unconstitutional either.

The Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist, challenged Congress to arrive

at a legislative solution to the problem of asbestos litigation.

> [T]he number of defendants - and thus the amount of assets available to satisfy the claims - is limited.... The lapse of time between exposure and disease interjects the undesirable, albeit unavoidable, result of penalizing current investors, operators and employees for the acts of others committed years ago.... The survival and economic viability of these businesses affect the livelihood of thousands of workers in plants and installations throughout the country, as well as the potential compensation of present and future claimants. The committee believes that any system that wastes assets in this context is a tragedy of major proportions.

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) at 29. But Congress has not risen to the challenge either.

The Panel on Multidistrict Litigation also has recognized that,

given the number of pending punitive damage claims and the projected growth rate for such claims over the next twenty years, the problems may well increase. In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 418-19 (J.P.M.D.L. 1991) (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991)). The Panel identified the propriety of permitting further punitive damages awards as a pretrial matter which must be addressed by the transferee court. 771 F.Supp. at 420-21. Although the transferee court has remanded some cases without punitive damages, a general preclusive order has not been entered.

Thus, every court, committee or legislature which has looked at the issue has recognized the severity of the

problem, yet each has declined to act,[18] believing that they were "powerless" or that the solution more appropriately should come from someone else. As the Nation's highest court, this Court certainly is not powerless to rectify the problem, nor is there any more appropriate forum for dealing with it.

Punitive damages long ago reached the level of "overkill" in asbestos litigation. One recent ATLA-funded study reported that punitive damages have become much more frequent during the 1980's and 1990's. Rustad, at 23. Yet, if asbestos cases are *excluded* from the analysis, the number of punitive damages awards actually *fell* during the last six

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[18] For other courts which have acknowledged the problem, but declined to resolve it, see Magallanes v. Superior Court, 213 Cal. Rptr. 547, 552 (Cal. Ct. App. 1985); and Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989).

years. Id. Indeed, more than one fourth of all punitive damages awarded in the last 25 years have been in asbestos cases. Id. at 26. Just between 1987 and 1990, more than *$300 million* in punitive damages has been awarded by juries in asbestos cases. Brickman, supra, note 198 at 1868.

Punitive damages help fuel the engine which, at this late stage of the asbestos litigation, continues to pump twice as many cases into the system as are resolved.[19] "The U.S. Justice Department has observed that punitive damages have become a legal lottery where many plaintiffs regularly file claims. Even though their probability of success

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[19] The vast majority of these cases involve plaintiffs who are not even sick or impaired from asbestos. Forbes Magazine estimates that 65% to 80% of the claimants in asbestos suits currently pending in the legal system have no asbestos-related breathing impairment. Forbes, supra, at 76.

is small..., plaintiffs' lawyers recognize that if enough such claims are filed, they may eventually hit the jackpot[20]." Mahoney and Littlejohn, Innovation on Trial: Punitive Damages Verdicts vs. New Products, Science, December 15, 1989, at 1395, 1396. Surely, increasing the backlog of cases on hopelessly overcrowded dockets in jurisdictions across the country is not a societal goal which Haslip recognized.

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[20] This same observation was made about asbestos litigation more than eight years ago: "The asbestos litigation often resembles the casinos sixty miles to the east of Philadelphia than a courtroom procedure." Blue v. Johns-Manville Corp., 10 Phila. 23, 36 (Phil. Ct. Comm. Pleas Oct. 12, 1983) aff'd 496 A.2d 848 (Pa. Sup. Ct. 1985).

Given the realities of the contingent fee system, some asbestos plaintiffs' lawyers don't need to wait until the jury returns a verdict to hit the jackpot. "[E]ffective hourly rates in asbestos cases often exceed $1,000; in some cases, the hourly rates of return are greater than $2,000 and can be as high as $5,000 per hour." A handful of them made $250-$350 million just in 1989 from the Manville Trust alone. A number of them are among the best paid lawyers in America from bringing in thousands of asbestos cases. Brickman, supra note 61 at 1834-35.

Finally, punitive damages claims in asbestos cases wreak havoc on attempts to achieve global settlement negotiations between plaintiffs and defendants. Judge William W. Schwarzer noted that "[b]arring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." Schwarzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991). "In rejecting settlement offers, plaintiffs' lawyers sometimes state that because of the possibility of punitive damages, they would prefer to 'roll the dice.'" Brickman, supra note 202 at 1868.

The cumulative effect of multiple punitive damages awards on defendants in

asbestos litigation has been staggering. Otherwise healthy companies have been bankrupted; tens of thousands of jobs have been lost; and meanwhile, a few lawyers have become multi-millionaires. The imposition of punitive damages in this, or any other asbestos case, serves no legitimate societal goals, and hence, violates the fundamental fairness doctrine of the Fourteenth Amendment.

3. Additional Punitive Damages Awards Would Violate the Right of Defendants not to be Punished Repeatedly for the Same Conduct.

The cumulative *effect* of multiple punitive damages awards on defendants is not the only violation of their due process rights. Defendants have a right under the "fundamental fairness" doctrine of the Fourteenth Amendment not to be

punished repeatedly for the same course of conduct. Although this Court has held that a Fifth Amendment "double jeopardy" argument per se is not available to civil defendants, see, United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), the Due Process Clause nonetheless provides defendants with the same protections afforded under the Fifth Amendment.

> A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate "double jeopardy" but simply because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is part of the process that is due under our constitutional system.

In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981), vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

Thus, irrespective of the size of the awards in this case, the mere fact that Keene was assessed punitive damages twenty-one times in the same trial for the same course of conduct violates Keene's due process rights. As previously discussed, plaintiffs' claims in this case, or any case involving asbestos, were not based on the allegation that Keene engaged in reprehensible conduct directed toward any particular plaintiff in any particular case. Rather, plaintiffs allege that the general course of conduct of Keene's predecessors, *the same conduct in every*

case, supports the imposition of punitive damages.[21] Thus, Keene has been repeatedly put at risk, and repeatedly punished, for the same conduct. The "fundamental fairness" doctrine of the Due Process Clause prohibits this practice.

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[21] Indeed, this broad brush approach paints, not only across different cases, but across different defendants. In these cases, as in many other jurisdictions, punitive damages evidence as to one defendant is introduced as to all other defendants. The intra-company documents introduced by plaintiffs in an attempt to prove the punitive culpability of Owens-Corning Fiberglas Corp. were admitted as to *all* defendants, even though there was no allegation that the other defendants had ever seen those documents. Trial tr. 10/18/90 Vol. II at p.110, L.20 to p.113, L.7. As Judge Starcher put it, the documents demonstrated "how you folks *could have* developed a strategy on these issues because one company did." Id. at p.112, L.11 to L.13. Thus, plaintiffs' punitive damages claims not only were not plaintiff-specific, they were not even defendant-specific.

II.

THE FAILURE OF THE TRIAL COURT AND THE SUPREME COURT OF APPEALS OF WEST VIRGINIA TO EVALUATE THE PUNITIVE DAMAGES VERDICTS, IN ACCORDANCE WITH THIS COURT'S RULING IN PACIFIC MUTUAL LIFE INSURANCE CO. V. HASLIP, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

If this Court declines to declare that the punitive damages verdicts in these, and all asbestos cases, violate the substantive due process protections enunciated in Haslip, then the Court *must* recognize that the procedural protections of Haslip were blatantly ignored in these cases by a court which, in another case six months earlier, applied Haslip's mandate almost verbatim. At a minimum, these cases must be remanded for reconsideration in light of this Court's ruling in Haslip.

In Haslip, the Court upheld the procedural protections implemented by the

Alabama Supreme Court. 111 S.Ct. at 1044-46. In Alabama, the trial court is required first to determine whether the punitive damages award is constitutionally excessive and must place on the record detailed reasons for its interference, or failure to interfere, with the jury's verdict on the grounds of excessiveness. Id. at 1044. On appeal, a similar analysis is required to determine whether the punitive damages award "'exceed[s] an amount that will accomplish society's goals of punishment and deterrence.'" Id. at 1045 (quoting Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989)). These procedures, the Haslip Court ruled, provide the "additional check" on the jury's and trial court's discretion required by the "fundamental fairness" doctrine of the

Due Process Clause. Haslip, 111 S.Ct. at 1045.

Haslip articulated at least nine factors to be considered in determining the propriety of a punitive damages verdict: (1) the impact of a punitive damage award on innocent third parties; (2) the degree of reprehensibility of the defendant's conduct; (3) the duration of that conduct; (4) the defendant's awareness of the conduct; (5) any concealment; (6) the existence and frequency of similar past conduct; (7) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant sustain a loss; (8) the financial position of the defendant; and (9) the existence of other civil awards against the defendant for the same conduct. Haslip, 111 S.Ct. at 1044-1045.

As this Court specifically recognized, the pre-Haslip West Virginia scheme under which punitive damages were reviewed (or more accurately, not reviewed) in these cases does not pass constitutional muster. Prior to Haslip, a West Virginia jury was allowed to award punitive damages against a defendant if it found simply that "'the defendant... acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations....'" Wells v. Smith, 297 S.E.2d 872, 877 (W. Va. 1982) (citing, Mayer v. Frobe, 22 S.E. 58 (1895)). Reviewing courts were cautioned that "the degree of punishment to be inflicted on the wrongdoer is peculiarly within the province of the jury," Wells, 297 S.E.2d at 880, and were permitted to overturn a jury's punitive damages

verdict only if "the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury...." Id.

Shortly after its decision in Haslip, this Court found the West Virginia punitive damages scheme to be constitutionally deficient and on June 28, 1991, granted a petition for writ of certiorari to the Supreme Court of Appeals of West Virginia in the case of Fleming Landfill, Inc. v. Garnes, 111 S. Ct. 2882 (1991). This Court vacated the judgment in Fleming Landfill, which included an award of punitive damages, and remanded the case to the Supreme Court of Appeals of West Virginia for further consideration in light of the Haslip decision. Id.

Declaring Haslip to be "a major step in the unification of America's

decisional law", the Supreme Court of Appeals for West Virginia, on remand, invalidated the then-existing West Virginia punitive damages scheme and established new criteria consistent the Haslip mandate. Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 905, 908 (W. Va. 1991). Specifically and significantly, the Garnes court held that the vague criteria for post trial review set forth in Wells v. Smith - and ostensibly applied in these cases - "provide insufficient review by the trial court of punitive damages awards." Id. at 908.

The Garnes court directed that, upon remand, the trial court was to "carefully explain [to the jury] the factors to be considered in awarding punitive damages." Id. at 908-9. The court then listed the factors which must be considered by a

jury under Haslip to ensure that a defendant's due process rights are upheld: the reprehensibility of the defendant's conduct; the duration of the conduct; awareness of the potential harm caused by the conduct; any attempt to conceal the conduct; any similar past conduct; the profit, if any, from the conduct; and the financial position of the defendant. Id. The court also ruled that the punitive damages must bear some reasonable relationship to the harm caused and to the compensatory damages awarded. Id.

The Garnes court further held that the trial court and appellate court, on review, must consider certain additional factors under Haslip: the cost of the litigation; any criminal sanctions imposed on defendants; any other civil actions against the same defendant based

on the same course of conduct; and the appropriateness of the verdict to encourage fair and reasonable settlements. Id. For the post-trial review to be meaningful at the appellate level, the Garnes court required the trial court to "thoroughly set out the reasons for changing (or not changing) the award." Id. at 910.

The Garnes court correctly held that the West Virginia standard which governed punitive damages claims at the time of the verdicts in these cases was so deficient as to violate the "fundamental fairness" requirement of the Due Process Clause. Indeed, the facts of this case provide no better example of the accuracy of the Garnes court's holding. At the trials of the Adams and Barnes groups, the two juries considered literally the identical evidence on punitive damages,

yet one jury assessed punitive damages against Keene under the West Virginia standard, while the other concluded that the same evidence was insufficient to support a claim for punitive damages under the same standard![22]

In a clear abuse of its discretionary power, the Supreme Court of Appeals of West Virginia inexplicably rejected defendants' petitions for appeal. It did so in spite of this Court's ruling in Haslip; in spite of the decision vacating and remanding the judgment in Fleming Landfill; in spite of the Garnes court's recognition that the

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[22] One cannot argue that the differences between the verdicts was a product of the juries' consideration of the extent of harm inflicted. The jury in these cases awarded $5,000 in every single case, irrespective of the injury to the particular plaintiff. The compensatory verdicts ranged from $15,000 to $299,200, while the punitive damages verdicts steadfastly remained at $5,000 per plaintiff. Likewise, the Barnes jury found that punitive damages were not warranted, again irrespective of a plaintiff's injury or the compensatory damages awarded in a given case.

former West Virginia punitive damages scheme violated defendants' due process rights; and in spite of the obvious inadequacies of standards which allowed one jury to award punitive damages while another jury, hearing the identical evidence, refused to award punitive damages.

This Court and the Supreme Court of Appeals for West Virginia have ruled that the former West Virginia punitive damages scheme provided insufficient jury guidelines and post-trial review. Fleming Landfill, 111 S. Ct. 2882; Garnes, 413 S.E.2d at 905. The punitive damages verdicts in these cases were rendered under that unconstitutional scheme. The jury did not consider *any* evidence of the type required by Haslip, nor is there any indication that either the trial court or the Supreme Court of

Appeals evaluated the factors which Haslip held were necessary to protect defendants' due process rights.[23] There is no explanation, and no excuse, for the West Virginia Supreme Court of Appeals' arbitrary refusal to vacate the judgments and remand the cases to the trial court for reconsideration in light of the Haslip and Garnes opinions.

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[23] The procedural protections established by Haslip to safeguard defendants' rights in punitive damages proceedings were ignored in these cases. This is hardly surprising, since they are almost universally ignored in dealing with the problem of multiple punitive damages awards in asbestos litigation nationwide. There simply is no uniform system in place for reviewing total punitive damage awards in asbestos actions nationwide to insure that these awards will not exceed the limits imposed by due process, either singly or cumulatively. Without these procedural protections to assure that multiple punitive damages awards do not exceed the amount necessary to accomplish the goals of punishment and deterrence, any further award of punitive damages in this or any asbestos case would prima facie violate the Due Process Clause.

But, even if the *procedural* guidelines mandated by Haslip somehow were implemented on a national scale, further punitive damages awards would violate the *substantive* proscriptions of Haslip, since additional punitive awards will do nothing to further the societal goals of punishment and deterrence.

Had the Supreme Court of Appeals followed its own direction and remanded these cases for constitutionally appropriate review of the punitive damages verdicts, the trial court would have discovered that any further award of punitive damages against Keene would violate the Due Process Clause of the Fourteenth Amendment. Neither the societal goal of punishment nor deterrence would be advanced by punitive damages awards against Keene. None of the factors which the Haslip court found must be considered on this issue support an award of punitive damages.

For example, the "impact on innocent third parties" of each punitive damages award is sharply felt by Keene. Due to the tremendous number of asbestos cases pending against it, the threat of bankruptcy is very real. If Keene must

pay punitive damages verdicts to plaintiffs who already have been fully compensated, thousands of existing and future claimants against Keene may well receive no financial compensation for their injuries. In addition, if Keene were forced into bankruptcy, the real impact would be felt by the employees of Keene's operating division (loss of their jobs), its shareholders and its customers, including the United States Government, which purchases parts from Keene's operating division for use in the Patriot Missile program.

There is no "reprehensibility" in *Keene's* conduct. Keene has never done anything that was or is illegal. For four years, a Keene subsidiary sold a few insulation products which contained small amounts of asbestos, supplied by others, to meet customer specifications,

including those of the United States Government. On this evidence, the Barnes jury found, as have dozens of other juries, that there is no proof to support a punitive damages verdict against Keene. Nevertheless, to date, Keene has spent fifty times the purchase price of BEH in indemnification of asbestos-related claims and legal fees, and has pledged 80% of its remaining assets to compensate persons with asbestos-related injuries from exposure to BEH's thermal insulation products.

Another factor which courts must consider is the duration of the defendant's conduct. Keene's association with an asbestos-containing product spanned only four years, yet Keene, has been defending itself against more than 150,000 past or present punitive damages claims for more than a decade.

Keene did not engage in any "similar past conduct". Keene was founded only twenty-five years ago and neither it nor BEH was ever involved in any similar product liability problem.

Courts are required to consider the "profitability to the defendant of the wrongful conduct." Yet, the BEH division was *unprofitable* during the years in which it was owned by Keene.

Courts also must consider the existence of other civil awards against the defendant for the same conduct. In the case of Keene, through June 30, 1992, Keene had already been sued more than 156,000 times in asbestos cases. The company already has been forced to spend nearly $400 million on asbestos-related litigation. Keene has been subject to outstanding compensatory verdicts totalling approximately $70 million, of

which approximately $13 million is punitive damages for the identical course of conduct - BEH's production of asbestos insulation.

Finally, the dire "financial position" of Keene may be the strongest argument against further punitive damages awards. Keene's 1991 sales totaled less than $10 million, but it spends more than $800,000 *each week* to resolve litigation. Although Keene has disposed of 78,000 lawsuits to date, it remains a defendant in approximately 87,000 asbestos cases nationwide. In July, 1990, Keene offered approximately 80% of its remaining net worth to resolve the remaining asbestos lawsuits. By June 30, 1992, Keene's net worth was approximately $134 million with an estimated $58 million additional in available insurance coverage for its asbestos liabilities. This represents an

average of slightly more than $2,000 for each existing asbestos claimant. Moreover, this estimate of available resources for the average claimant does not account for the additional 2,000 asbestos claims being filed against Keene per month, nor for Keene's expenses and legal fees in defending the thousands of cases brought by unimpaired plaintiffs. This enormous future liability poses a very serious problem, made significantly worse by punitive damages.

Inasmuch as the jury in these cases awarded punitive damages under standards already declared unconstitutional, and the reviewing court's refusal to consider the verdicts under the standards mandated by Haslip, the jury's verdicts on punitive damages cannot stand. This Court should vacate the judgments and rule that further punitive awards in

asbestos cases is unwarranted and unconstitutional or, at a minimum, remand these cases for consideration in light of Haslip.

CONCLUSION

Pacific Mut. Life Ins. Co. v. Haslip requires that any award of punitive damages be assessed through a rational and systematic decision-making process. 111 S. Ct. 1032. The lack of such a rational and systematic decision making process in this case, and nationwide, to control the totality of punitive damages and ensure "meaningful individualized assessment of appropriate deterrence and retribution" results in repetitive punitive damage awards which violate defendants' constitutional rights.

The imposition of additional punitive damages awards in these or any other asbestos cases advances no legitimate societal goals. Thus, any such award of punitive damages would violate the Due Process Clause.

For the foregoing reasons, Keene Corporation's petition should be granted.

Respectfully submitted,

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